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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 529

EARL M. OWENS,
Petitioner,

vs.

JOHN P. TRAYNOR, Deputy Commissioner,
United States Department of Labor

and

BETHLEHEM STEEL CORPORATION
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Earl M. Owens, Petitioner, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered June 19, 1968, affirming the judgment of the United States District Court for the Fourth Circuit.

OPINIONS BELOW

The opinions of John P. Traynor dated March 11, 1965, and April 21, 1967, are set forth respectively in Appendix A, *infra,* pp. 1-6.

The decision of the United States District Court for the District of Maryland reported as Earl M. Owens vs. John P. Traynor, et al, 274 F. Supp. 770 (4th Circuit) and the second decision of the United States District Court for the District of Maryland reported as Earl M. Owens vs. John P. Traynor, et al. F. Supp. (4th Circuit) is printed in Appendix B, *infra*, pp. 7-15.

The opinion of the U.S. Court of Appeals is printed in Appendix C, *infra*, pp. 16, 17.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit below entered an Order affirming the decision of the United States District Court for the District of Maryland on June 19, 1968. The jurisdiction of this Court is invoked under 28 U.S.C.A., Sec. 1254(1).

That said Petition has been filed in compliance with the time allotted under 28 U.S.C.A., Sec. 2101(c).

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that there was ample evidence to support the Deputy Commissioner's finding of fact, including his ultimate findings that no loss of wage earning capacity had been shown?

2. Did the Court of Appeals err in not finding that the decision of the United States District Court dated November 29, 1966 (App. B, pp. 7-14), was improper and beyond the scope of the authority of said Court?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Longshoremen's and Harborworkers' Compensation Act as amended. 33 U.S.C.A., Sec. 902, (10) & (13), 908(c) (21), 908(h), 919(c) & (e), 921(a) & (b), & 922. Said sections are printed as Appendix D, *infra*, pp. 18-21.

STATEMENT OF THE CASE

In June, 1961, the Petitioner fell while at work for Bethlehem Steel Company and as a result of his fall sustained serious injury to his back; that on December 20, 1963, a Compensation Order was filed by the then Deputy Commissioner awarding benefits for temporary total disability to the Petitioner for the period September 27, 1962 to November 25, 1962. This Order was appealed to the District Court by the Employer, and on August 27, 1964, the Court affirmed the Deputy Commissioner's Award of Compensation. That the Petitioner subsequently filed for permanent partial disability based on loss of wage earning capacity as a result of the injury to his back. On March 11, 1965, the Deputy Commissioner, John P. Traynor, passed an Order (A. pp. 1-3) in which he found that the Plaintiff has sustained a serious, anatomical impairment of his back (25%) as a result of the injury and subsequent surgery, and there existed a reasonable probability that his injury-related condition may worsen; however, he rejected the claim since the Claimant had not up to that time demonstrated that he had sustained any partial loss of wage earning capacity as a result of his injury-related condition, but the Deputy Commissioner continued the case for consideration of further disability. This Order was appealed to the United States District Court for the District of Maryland alleging that the Deputy Commissioner erred in his determination of the law and facts of the case, that his finding of a reasonable probability of a worsening of condition required the passing of an Award for permanent partial disability at that time, and that his continuing the case for a consideration of further disability definitely indicated that the Commissioner felt that there was, or would be sometime in the future a loss of wage earning capacity as a result of his injury. The United States District Court

for the District of Maryland in its decision dated November 29, 1966, (A. 7-14), remanded the case to the Deputy Commissioner for clarification of the Order. The Deputy Commissioner was asked to specify which of three possible constructions he had meant, (A. 13). The Court ordered the Deputy Commissioner to indicate clearly whether he meant (a), (b), or (c), or whether he meant something else. And if he meant (a) or (b), he should again reject the claim, and the right to reopen would be controlled by the provisions of Sec. 922. If he meant (c), he should state under what Sec. he considered he had the right to order that the matter be "continued in consideration of further disability." That pursuant to the Court's Order, the Deputy Commissioner filed a Compensation Order dated April 21, 1967, (A. 4-6) indicating "that pursuant to the instructions contained in the United States District Court Order dated November 29, 1966, the Deputy Commissioner indicates that he meant (b) as referred to in the District Court's Order." And thereafter again rejected the claim for permanent partial disability. That this Supplemental Order was appealed to the United States District Court and on October 27, 1967, a Supplementary Opinion and Order (A. 14-15) was filed, affirming the Deputy Commissioner's denial of permanent partial disability benefits. That an appeal of the decision of the United States District Court was filed in the United States Court of Appeals for the Fourth Circuit. That an Opinion of said Court dated June 19, 1968 (A. 16-17), affirmed the decision of the United States District Court and the Deputy Commissioner. The Writ of Certiorari by Petitioner to this Court followed.

REASONS FOR GRANTING THE WRIT

1. *The decision of the Court below is in direct conflict with the decision of the United States Court of Appeals for the Second Circuit.*

In *Travelers Insurance Company* v. *McLellan*, 288 F. 2d 50 (1961) the Circuit Court of Appeals for the Second Circuit upheld the finding of the Deputy Commissioner that the Claimant's injury could well cause some future disablement greater than that presently suffered, which is a factor that the Act directs be taken into account in determining the loss of wage earning capacity. Indeed, if the Claimant were to await such aggravation before presenting a claim, he might well find the one-year limitation to be a bar. In the instant case, the Deputy Commissioner's finding that there exists a reasonable probability that the Claimant's injury-related condition may worsen and his attempt to allow the claim to remain open past the statutory provisions required a passing of an Award of permanent partial disability and the Court of Appeals error in failing to require the passing of such an Award under these conditions was contrary to the decisions of the Second Circuit.

In 2 Larsons Workmen's Compensation Law, Section 5721 it states: "Earning capacity, however, is a more theoretical concept. It obviously does not mean actual earnings, since the legislature deliberately chose a different phrase for the post-injury earnings factor. Obviously we cannot take an arbitrary period of, say, six months after the injury as conclusive, since for a multitude of reasons, that period might be entirely non-representative. On the other hand, we cannot wait out the rest of the Claimant's life to see what his average weekly wage loss alternatively turned out to be, for by then, it would be too late for the Award to do him any good. *An Award must be made now and paid now.* (Emphasis added.) The only possible solution is to make the best possible estimate of future impairment earnings, on the strength not only of actual post-injury earnings, but of any other

available clues. It is uniformly held, therefore, without regard to statutory variations in the phrasing of the test, that a finding of disability may stand even when there is evidence of actual post-injury earnings equaling or exceeding those received before the accident.

2. THE QUESTIONS HERE PRESENTED ARE OF CRITICAL AND IMMEDIATE IMPORTANCE IN THE ADMINISTRATION OF THE LONGSHOREMEN'S AND HARBOR WORKERS' ACT THROUGHOUT THE COUNTRY BY DEPUTY COMMISSIONERS AND THE DEPARTMENT OF LABOR.

3. *The statute involved being a Federal one, it is, of course, extremely important that it be uniformly interpreted and applied throughout the country.* It has been so interpreted and applied until the decision below. Unless the Writ is issued and the conflict between the Circuits resolved by this Court, the result will be that a longshoreman who receives a serious anatomical disability to any portion of the trunk of his body who subsequently returns to work for the same employer in the same position making the same or more money will as a matter of law be rejected in his claim for permanent partial disability as a result of loss of wage earning capacity, and if he was to wait until the likelihood of increased disability at sometime in the future to materialize he would probably be barred by the one-year limitation.

4. *Clearly, it is in the public's interest for this Court to settle once and for all whether wages are equated with earning capacity,* and further to clarify *Sec. 33 U.S.C.A. 908(h) (A. 18).* The decision below involves important interpretations of 33 U.S.C. Code Annotated which have not been, but should be settled by this Court. (A. 18-21).

5. *It is respectfully submitted that the United States District Court erred in its Order to the Deputy Commissioner dated November 29, 1966,* in that when it was remanded to the Deputy Commissioner for clarification of the meaning of said Order, the Deputy Commissioner was asked to specify which of three possible constructions he had meant and the Court in construction (b) stated that said "construction would not be authorized by the statute." The Court instead of directing that if this was the construction which was used by the Deputy Commissioner in arriving at his decision that he should either hold another hearing or review the case knowing that said finding was unauthorized by the statute. However, the Court ordered that the Deputy Commissioner if he meant "B", "should again reject the claim, and the right to reopen will be controlled by the provisions of Sec. 922." Certainly, after the Court had informed the Deputy Commissioner that his construction was unauthorized by the statute should not have directed that he reject the claim but should have allowed him to reconsider the case.

This certainly was an unwarranted intrusion into the administrative process by the Court. As stated in *F.T.C. vs. J. Weingarten, Inc.*, 336 F. 2d 687 (5th Circuit 1964). It states

> "Congress recognizes that in administrative adjudication much must be left to the hearing officers. Indeed it is the fact finding function through the inescapable use of hearing officers, their sense of independence, and the review of findings, which has been at the core of the concern for improving the quality of such actions." "There is simply no basis for the District Judge taking it on himself to tell the Commission how it should husband and deploy its resources and manpower."

Also in *South Port Land and Commercial Co. vs. Stewart Udall, 244 F. Supp. 172* (D.C. California 1965) the Court held,

> "The relief afforded by the Code Section pertaining to the judicial review of agency action is not in nature of mandatory Court order which preempts final administrative determination."

Also *James J. Williams, Inc. vs.* U.S. 241 F. Supp. 535 (D.C. Washington 1965)

> "The Court has power to remand to administrative body to enable that body to take into consideration oversites which may have crept into decision of body by reasons of mistake or inadvertence."

The district court in the instant case should have remanded for further proceedings or determination in conformity with the decision of the said Court. See, *Morand Brothers Beverage Co. vs. National Labor Relations Board,* 204 F. 2d 529 (7th Circuit 1953) and should have advised the Commissioner to arrive at another decision after he had reappraised the testimony in light of his decision. See *NG YIP YEE vs. Barber,* 267 F. 2d 206.

6. *It is respectfully submitted that the decision of the United States Court of Appeals for the Fourth Circuit* (A. 16, 17), *was plainly erroneous and should be reviewed by this Honorable Court.* The Claimant himself testified:

Q. Now, Mr. Owens, what is your present physical condition? A. In the past I have been having trouble with my left leg. It gives me trouble, especially if I am exerting myself too long periods of time. My back gives me trouble if I sit too long such as a driving position.

Q. Now you mention you have difficulty when you are exerting yourself. What do you mean by that, sir? A. Well, for example, I can't shovel snow—I say I can't shovel snow, I can shovel or say use a shovel, but not to the extent that I could before; my back gets tired very quickly, and I do get pains which extend down my leg where this condition hurts.

Q. What physical labor did you do in performing your job, Mr. Owens? A. The majority of activities aboard ship, of course, I have an office on land in the building, aboard ship the activities consist of occasionally using the ship's ladder, quite a bit, and of course, the physical position of my job is more or less standing. I don't sit on my job. I use instruments, very small instruments, to take readings on the machinery that I am testing, of course, then recording the data.

Q. All right, so there were times then prior to the injury where you would crawl through various places to get to a machine. A. Yes, sir.

Q. How about subsequent to the injury? A. Yes, sir. I don't say that I haven't done this without feeling.

Q. What do you mean by that? A. Well, the aggravation—perhaps I don't get around as fast as I used to, or ignoring my physical condition now, but I still get there. As I say, I haven't never turned down five minutes worth of work. I don't care where it is.

Q. You mentioned something in your testimony a second ago which would indicate that when you perform these things that there was some feeling in connection with it. Would you explain that more fully to me? A. Yes, sir. I thought I had testified to the fact that, while climbing ladders and things of this nature, I do get pains in my leg; even a sitting position or a stooping position, I do

notice trouble with my back. My doctor tells me that this is a natural reoccurrence.

Dr. I. H. Maseritz testified as follows:

Q. Doctor, what is the basis of your opinion as to the percentage of disability? A. It is functional and anatomical.

Q. Does the patient have a full range of motion of the spine? A. No.

Q. Where is the spine restricted, if at all? A. The lumbar and lower dorsal.

Q. If he were your patient, you wouldn't forbid him to walk or climb ladders, would you? A. I wouldn't forbid him to walk. I don't think I would advise him to climb ladders. I wouldn't advise him to. He might be able to do so and get away with it.

Also Dr. John O. Sharretts (Employers witness) testified in reply to the question, "I wonder if you could clarify that with respect to the activities Claimant can engage in, such as restricting the type activity, sustained activity, insofar as walking, bending, climbing ladders, crawling, and so on, is concerned. Could you give us some clarification on this?" After which the Doctor gave a lengthy explanation of the question. The Deputy Commissioner then asked, *"In other words, you are saying that there are some limitations on all of those activities that you just referred to?"*

A. *Yes, there can be some; yes, sir.* (Emphasis supplied)

The Deputy Commissioner in his finding that the Claimant has a 25% anatomical impairment certainly indicates that the Commissioner accepted the medical testimony of Dr. I H. Maseritz who evaluated the disability of the Claimant as 25% loss of use of the back. In his testimony, the Doctor testified that the Claimant did have restric-

tions in his spine and leg and that the disability rating and restrictions were as a result of the ruptured disc for which the Claimant did receive an operation.

In reviewing all applicable law and in view of the humanitarian purpose of the Act, it seems clear that the Courts hold that a Claimant with a serious back injury should receive an Award of permanent partial disability as a result of loss of wage earning capacity. As stated in *Bethlehem Steel Company v. Traynor,* 239 F. Supp. 749 Md. 1965, "Commissioner should allow adequate awards to men with disabling back injuries, but should be careful not to encourage exaggerated claims based on pre-existing condition which have been aggravated only slightly or temporarily or not at all by minor injuries. Much must be left to the Commission's sense and judgment of the case." Also the case of *Ennis v. O'Hearn,* 223 F. 2d 755, Fourth Circuit 1955, which reversed the District Court and the Commissioner who had rejected the claim for loss of wage earning capacity as a result of a twisted back, this case was similar to the case at bar in that the Claimant's doctor testified that the Claimant had a 20% disability and the Company doctor testified that the Claimant probably had a disability of less than 10%. The Court held "only one logical inference is permissible from the Company doctor's statement that Ennis was suffering some small percentage of permanent disability. *Such an inference alone can form no basis for a finding that no disability exists.* It is the antithesis of such a finding. All the other medical testimony bearing on the question of physical disability indicates that Ennis is suffering under a permanent partial disability due to the twisting of his back."

In the Owens case, Dr. Maseritz testified that the Claimant had a 25% disability to the back, and Dr. Sharretts

testified that the Claimant had a 10% disability to the back.

CONCLUSION

It is respectfully submitted that for the foregoing reasons this petition for a writ of certiorari should be granted.

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